Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

JUDY WEAVER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Judy Weaver was convicted for aiding and abetting the failure to make refunds of student loans and Pell Grant funds in violation of 20 U.S.C. § 1097(a). That section imposes criminal liability upon "[a]ny person who knowingly and willfully embezzles, *misapplies*, steals, obtains by fraud, false statement or forgery or *fails to refund*" financial aid funds provided or insured by the federal government (emphasis added). The indictment and factual basis both failed to allege Mrs. Weaver converted the subject funds. Despite this Court's previous observation that the failure to refund constitutes misapplication under § 1097(a), the lower court held misapplication and failure to refund are separate and independent crimes. The court also held although conversion is an element of misapplication, it is not an element of the failure to refund student loan funds. The questions presented are:

1. Whether "fails to refund" is conduct constituting the offense of misapplication under § 1097(a), or is instead a separate and independent offense.

2. Whether a prosecution pursuant to § 1097(a) for failure to refund student loan funds requires allegation and proof of conversion.

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PETITION FOR A WRIT OF CERTIORARI

Judy Weaver ("Weaver") respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on December 18, 2001.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit that gives rise to this petition is reported at 275 F.3d 1320 (App. 1-27). The February 26, 2002 order of the Eleventh Circuit denying the petition for rehearing and suggestion for rehearing en banc is unreported (App. 28-29). The orders of the district court are unreported.

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit entered its corrected opinion and judgment on December 18, 2001. The Eleventh Circuit entered its order denying Weaver's timely filed petition for rehearing and rehearing en banc on February 26, 2002. Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the denial of rehearing. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED IN THIS CASE

United States Code Title 20; § 1097(a), as amended in 1992, provides:

(a) **In general**

Any person who knowingly and willfully embezzles, misapplies, steals, obtains by fraud, false statement, or forgery, or fails to refund any funds, assets, or property provided or insured under this subchapter and part C of subchapter I of chapter 34 of Title 42 or attempts to so embezzle, misapply, steal, obtain by fraud, false statement or forgery, or fails to refund any funds, assets, or property, shall be fined not more than $20,000 or imprisoned for not more than 5 years, or both, except if the amount so embezzled, misapplied, stolen, obtained by fraud, false statement, or forgery, or failed to be refunded does not exceed $200, then the fine shall not be more than $5,000 and imprisonment shall not exceed one year, or both.

STATEMENT OF THE CASE

A. The Higher Education Act of 1965 and Amendments

This case concerns the meaning of § 490(a) (Pub. L. 99-498), 100 Stat. 1491 of the Higher Education Act of 1965 as amended by the Higher Education Amendments of 1992, Pub. L. 102-325, § 495, 106 Stat. 631 and codified at 20 U.S.C. § 1097(a) (1992 ed.). That section declares it a felony "knowingly and willfully" to, among others, misapply or fail to refund student loan funds insured under Title IV of the Higher Education Act of 1965.

Immediately prior to its amendment in 1992, 20 U.S.C. § 1097(a) provided in relevant part: "Any person who knowingly and willfully embezzles, *misapplies*, steals,

or obtains by fraud, false statement, or forgery any funds, assets, or property provided or insured under this subchapter . . . shall be fined not more than $10,000 or imprisoned for not more than 5 years, or both" (emphasis added).

In 1992, § 1097(a) was amended. The amended, and current, version provides in relevant part: "Any person who knowingly and willfully embezzles, *misapplies*, steals, obtains by fraud, false statement, or forgery, or *fails to refund* any funds, assets, or property provided or insured under this subchapter . . . shall be fined not more than $20,000 or imprisoned not more than 5 years, or both" (emphasis added).

The legislative history accompanying the 1992 amendment to § 1097(a) provides:

> Both the House and Senate bills make the attempt to obtain Title IV funds illegally subject to criminal penalty, but the Senate bill is more specific and includes false statements, forgery, or fraud. The Senate bill also includes the failure to make refunds among the specifically named *activities* subject to criminal penalties. The House recedes. The conferees wish to *emphasize* that *failure to pay refunds does constitute criminal misapplication* under current law. *Language is added in this bill merely as a clarification.*

H.R. Conf. Rep. No. 102-630, at 513 (1992) (emphasis added).

B. Factual Background

The Information alleged Flagler Career Institute, Inc. ("Flagler") was a wholly owned subsidiary of Wangberg

Enterprises, Inc, which was solely owned by Louis Wangberg, who was not charged in the Information. Flagler offered associate degrees in various medically-related programs. It closed in February, 1998. Flagler participated in federal student loan and grant programs which were insured or guaranteed by the Department of Education and was required to refund federal loan and grant money for students who withdrew from the school.

The Information charged Mrs. Weaver was the director of finance for Wangberg Enterprises, Inc., and/or Flagler. The Information further asserted Louis Wangberg, not Mrs. Weaver, signed a Program Participation Agreement with the Department of Education, agreeing to comply with all statutes and regulations governing student loan programs, including repayment of unearned tuition.

The Factual Basis of the Plea Agreement describes the school's participation in federal grant and loan programs, the school's responsibility to make refunds when a student withdrew, and Mrs. Weaver's assistance in developing corporate strategies, policies, and budgets. The Factual Basis also asserts Mrs. Weaver's responsibility for review of the school's calculation of refund amounts, preparation of accounts payable and her repeated discussions with Mr. Wangberg, "a number of times per month, . . . [about] the refund issues and Flagler's need to make refund payments."

The Factual Basis further recites Mr. Wangberg "did not consider making refunds a priority," an admission that Mr. Wangberg, not Mrs. Weaver, gave authorization for presentment for payment. The Factual Basis also asserts Mrs. Weaver had responsibility for physically writing

checks, but only until February 1997, when Mr. Wangberg took control of the funds and Mrs. Weaver thereafter could not write any checks without his approval. The checks were held by the school director until he was satisfied funds were available to release them.

As set forth in the Plea Agreement, Mrs. Weaver calculated refund amounts, physically wrote refund checks and was aware the school was having financial difficulties and there were refund arrearages. With minor exceptions, however, Mrs. Weaver did not have the final authority to submit refund checks for payment and the Factual Basis of the Plea Agreement does not allege that she had such authority, but rather asserts that authority was vested in Mr. Wangberg. Indeed, Mrs. Weaver had no authority to even write checks without prior approval for the entire last year of the school's operation, commencing in February 1997, during which time the refund balance grew substantially. Moreover, Mrs. Weaver is not alleged to be, nor was she responsible for, the financial difficulties and loss of accreditation that befell the school and ultimately led to the school's nonpayment of refunds.

Nowhere in the Information, Plea Agreement, Personalization of Elements, or the Factual Basis is it alleged Mrs. Weaver engaged in the intentional *conversion* of loan funds to her own use or the use of a third party.

C. Procedural History

A one count Information was filed on July 14, 1999, charging Mrs. Weaver with knowingly and willfully aiding and abetting a violation of 20 U.S.C. § 1097(a), in connection with Flagler's failure and/or inability to refund federal financial aid received by the school from or on

behalf of its students who subsequently withdrew from the school. A Plea Agreement was filed and Mrs Weaver's guilty plea subsequently was accepted by the district court, which had jurisdiction over this matter pursuant to 28 U.S.C. § 1331.

On May 31, 2000, Mrs. Weaver filed her Motion to Withdraw Guilty Plea and Request for Evidentiary Hearing. By order dated September 22, 2000, the motion was denied. Mrs. Weaver timely appealed from that order and it was docketed by the Court of Appeals for the Eleventh Circuit as appeal No. 00-15145-HH.[1] Mrs. Weaver subsequently was sentenced to the custody of the United States Bureau of Prisons to be imprisoned for a term of four (4) months. Mrs. Weaver then filed a Motion for Correction of Sentence, which was denied. Mrs. Weaver timely appealed from that order, which the Eleventh Circuit docketed as No. 00-15751-HH. The Eleventh Circuit consolidated the appeals.

On November 13, 2001, the panel filed its opinion affirming both the denial of Mrs. Weaver's Motion to Withdraw Guilty Plea and her Motion for Correction of Sentence. On December 18, 2001 the court vacated its November 13, 2001 opinion and substituted a corrected opinion. Mrs. Weaver timely filed Petitions for Rehearing and Rehearing En Banc of both opinions, which were

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[1] As noted by the Eleventh Circuit, Mrs. Weaver's argument that conversion is an element of failure to refund student loan funds under § 1097(a) was not addressed in the district court's order denying her motion to withdraw her plea. *United States v. Weaver*, 275 F.3d 1320, 1327 (11th Cir. 2002). That order therefore is not included in the Appendix to this Petition.

denied on January 7, 2002 and February 26, 2002, respectively.

The defendant is not in custody, having been granted bond pending appeal.

REASONS FOR GRANTING THE WRIT

The Eleventh Circuit's interpretation of § 1097(a) conflicts both with the Seventh Circuit's and this Court's interpretation of that section. There additionally is intracircuit conflict in the Eleventh Circuit concerning the application of § 1097(a), which has, and will continue, to produce anomalous and unjust results. Moreover, the Eleventh Circuit's decision has erroneously created a new federal crime. This case urgently requires this Court's review to prevent further improper prosecutions under § 1097(a).

I. The Court of Appeals' Interpretation of 20 U.S.C. § 1097(a) Conflicts with the Seventh Circuit's Interpretation

In Mrs. Weaver's appeal to the Eleventh Circuit, the court initially noted conversion is an element of misapplication under § 1097(a). *United States v. Weaver,* 275 F.3d 1320, 1330 (11th Cir. 2002) (citing *United States v. Kammer,* 1 F.3d 1161, 1165 (11th Cir. 1993) and *Bates v. United States,* 522 U.S. 23, 31 n.7, 118 S.Ct. 285,139 L.Ed.2d 215 (1997)). The court then acknowledged "the more difficult issue is whether 'fails to refund' is an independent ground upon which criminal liability attaches under § 1097(a),

and, if so, whether conversion is an element of that offense as well." *Id.*[2]

In its analysis of § 1097(a), the court found "no indication on the face of § 1097(a) that Congress intended 'misapplies' and 'fails to refund' to be the same thing or interchangeable." *Id.* at 1331. Had Congress, however, amended § 1097(a) to impose criminal liability upon "'[a]ny person who knowingly and willfully . . . misapplies by failing to refund'" student loan funds, the Eleventh Circuit would have agreed with Mrs. Weaver that the reference to failure to refund "was added only to clarify that a misapplication may encompass the failure to refund and that is not an independent" offense. *Id.* Because § 1097(a) contains no such language, the court concluded "fails to refund" is an offense separate from misapplication criminalized under § 1097(a). *Id.*

The Eleventh Circuit next examined the legislative history of the 1992 amendment to § 1097(a). The court found ambiguous the House Conference Report which provides "The conferees wish to emphasize that the failure to pay refunds does constitute criminal misapplication under current law. Language is added in this bill merely as a clarification." H.R. Con. Rep. No. 102-630, at 513 (1992) *reprinted in* 1992 U.S.C.C.A.N. 334, 628. The court noted Mrs. Weaver's interpretation of this history is that "misapplication may encompass a failure to refund but did

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[2] In framing the issue as whether "fails to refund" is an "independent *ground*" for liability under § 1097(a) and, if so, "whether conversion is an element of *that offense* as well, the Eleventh Circuit failed to distinguish criminal *conduct* from distinct criminal *offenses*. As shown *infra*, "fails to refund" is an example of *conduct* constituting the *offense* of misapplication under § 1097(a).

not eliminate the conversion requirement for a misapplication, even when the conduct is the failure to refund." *Id.* at 1332. The court's preferred interpretation of this history, however, was that

> Congress recognized that it had created a separate crime with its 'or fails to refund' language and added this legislative history to foreclose the obvious post-amendment argument that failure to refund only became a crime under § 1097(a) after the 1992 amendment. More specifically, under this interpretation, the legislative history only makes clear that an individual who failed to refund could always have been charged with criminal misapplication under the pre-amendment § 1097(a), and that the addition of 'fails to refund' as a separate crime does not change this.

Id.

The Seventh Circuit's interpretation of the 1992 amendments to § 1097(a) differs in principle from the Eleventh Circuit. In *United States v. Ross*, 77 F.3rd 1525 (7th Cir. 1996), Ross was convicted of violating § 1097(a). As Ross's trial took place in 1991, he was subject to the pre-amendment version of § 1097(a) which contained no reference to failure to refund. The trial court nonetheless instructed the jury it could convict Ross for "failure to make refunds." Ross argued the instruction was erroneous because § 1097(a) did not criminalize failure to refund until after his trial in July of 1992.

Noting the legislative history of the 1992 amendment to § 1097(a), the Seventh Circuit stated "failing to make refunds constituted misapplication within the meaning of § 1097(a) even prior to its amendment . . . Thus, the

district court's directions that *failure to properly refund federally insured moneys can constitute misapplication* were proper." *Id.* at 1541 (emphasis added). Thus, a conflict in principle exists between the Eleventh Circuit which interprets the failure to refund under § 1097(a) to be a *separate crime* from misapplication, not requiring proof of conversion, while the Seventh Circuit views a failure to refund as *conduct* within the ambit of the offense of misapplication, and not as an independent crime.[3] This Court should grant the petition to resolve this conflict.

II. The Court of Appeals' Interpretation of 20 U.S.C. § 1097(a) Conflicts with this Court's Interpretation of That Section

This Court previously interpreted 20 U.S.C. § 1097(a) in *Bates v. United States*, 522 U.S. 23, 118 S.Ct. 285, 139 L.Ed.2d 215 (1997). Bates was an educational institution financial officer alleged to have failed to make student loan refunds. *Bates*, 522 U.S. at 27, 118 S.Ct. at 288. He subsequently was indicted "on 12 counts of 'knowingly and willfully misapply[ing]' federally insured student loan funds between January 15, 1990, and June 15, 1990 in violation of 20 U.S.C. § 1097(a) (1988 ed.) . . . . " *Bates*, 522 U.S. at 28, 118 S.Ct. at 289 (citation omitted). Bates moved to dismiss the indictment on the ground a conviction under § 1097(a) for willful misapplication required

[3] As noted by this Court, the Seventh Circuit also recognizes conversion is an element of criminal misapplication under § 1097(a). *Bates v. United States*, 522 U.S. at 31, 118 S.Ct. at 291 ("Under the Seventh Circuit's construction, § 1097(a) catches only the transgressor who intentionally exercises unauthorized dominion over federally insured student loan funds for his own benefit or the benefit of a third party.")

allegation and proof of the defendant's intent to injure or defraud the United States. *Id.* As the indictment contained no such allegations, it was dismissed by the district court.

The Seventh Circuit concluded intent to defraud the United States was not an element of criminal misapplication under § 1097(a). This Court affirmed the Seventh Circuit, concluding "there is here neither text *nor history* warranting the construction of § 1097(a) that Bates urges us to adopt." *Bates*, 522 U.S. at 31, 118 S.Ct. at 290 (emphasis added).[4]

Bates additionally challenged his prosecution based on the 1992 amendment adding "fails to refund" to the text of § 1097(a). *Bates*, 522 U.S. at 32, 118 S.Ct. at 291. Bates contended the amendment "establishes that the deliberate failure to return GSL funds, without an intent to defraud, was not previously an offense within § 1097(a)'s compass, but became one only under the statute's current text." *Id.* Rejecting this argument, this Court stated

> Congress' 1992 amendment hardly means that § 1097(a) did not previously cover the conduct in question. *Cf. Commissioner v. Estate of Sternberger*, 348 U.S. 187, 194, 75 S.Ct. 229, 233, 99 L.Ed. 246 (1955) ('Subsequent amendments have clarified and not changed th[e earlier] principle.) The three added words – 'fails to refund' – simply foreclose any argument that § 1097(a) does not

[4] Unlike in *Bates*, history here demonstrates Congress intended "fails to refund" to be an activity subsumed within the offense of criminal misapplication pursuant to § 1097(a), and not a separate crime. *See National R. Passenger Corp. v. National Ass'n of R. Passengers*, 414 U.S. 453, 458, 94 S.Ct. 690, 693, 38 L.Ed.2d 646 (1974) ("[E]ven the most basic general principles of statutory construction must yield to clear contrary evidence of legislative intent.")

> reach the failure to make refunds; those words do not make the argument a persuasive one. See H.R. Conf. Rep. No. 102-630, p. 513 (1992) ("Failure to pay refunds does constitute criminal misapplication under current law. Language is added in this bill merely as a clarification.")

Id.

Thus, this Court's interpretation of § 1097(a) in *Bates* is that "fails to refund" is not a separate offense from criminal misapplication, but rather an activity subsumed within the latter. As such, the Eleventh Circuit's holding that the failure to refund is a crime separate from misapplication requiring no allegation or proof of conversion conflicts with this Court's interpretation of § 1097(a).[5] This Court should grant the petition to resolve this conflict.

III. The Court of Appeals' Decision Conflicts With Another Eleventh Circuit Decision

The Eleventh Circuit decision in this matter conflicts in principle with its earlier decision in *United States v. Kammer*, 1 F.3d 1161 (11th Cir. 1993). Kammer was a school owner convicted of the crime of misapplication under the pre-amendment § 1097(a) for failing to refund loan payments within the time prescribed by the Code of Federal Regulations. *Id.* at 1162-63. The withdrawn

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[5] "Although *Bates* did not address whether conversion is an element of criminal misapplication under § 1097(a), such a conclusion is implicit in its holding that a specific intent to defraud is not a required element of criminal misapplication." *United States v. Weaver*, 275 F.3d 1320, 1330 (11th Cir. 2002); *see United States v. Kammer*, 1 F.3d 116, 165 (11th Cir. 1993) (holding conversion is an element of criminal misapplication under § 1097(a)).

students' files contained copies of non-negotiated refund checks. *Id.* Kammer was "aging debts," including refunds, so "the most necessary and immediate debts" could be paid first. *Id.* at 1163. The debts Kammer paid in lieu of making refunds included her "salary, campus renovations, consulting fees, loan repayment to her husband, and her private housekeeper." *Id.* at n.5.

The federal regulations applicable both here and in *Kammer* permitted schools to "commingle" their own money with federal financial aid funds in operating accounts. The court concluded that the fact the school "may have paid operating expenses before a student withdrew, and thus did not have money to refund [the Department of Education] is not a conversion." *Id.* at 1166. That Kammer paid other operating expenses before making the refunds also did not establish a conversion, because the federal regulations contemplated commingling of funds with grant funds being used for operating expenses. *Id.* On these facts, the court reversed Kammer's conviction, noting "we do not hold that a *failure to refund* federal monies will never constitute a crime . . . We reverse in this case strictly on the facts of this case" (emphasis added). *Id.*

Like *Kammer*, Mrs. Weaver was aware school personnel held non-negotiated refund checks resulting from paying the most necessary and immediate school debts first, including teacher salaries. Further, as in *Kammer*, federal regulations permitted the commingling of operating and student loan funds here. In marked contrast to the facts in *Kammer*, however, Mrs. Weaver was not the school owner, but rather the director of finance. She was not a corporate officer, director or shareholder. Unlike *Kammer*, Mrs. Weaver did not use student loan funds to pay campus

renovation bills, consulting fees or loan repayments to her husband or her private housekeeper.

Kammer's *conduct* was the failure to refund student loan funds. She was charged, however, with the *crime* of misapplication of federal financial aid funds. Similarly, Mrs. Weaver's alleged conduct was the failure to refund student loan funds. She was prosecuted, however, under the failure to refund prong of § 1097(a), as amended. For more reprehensible conduct, Kammer's *conviction* was *reversed,* while Mrs. Weaver was not permitted to *withdraw her guilty plea* and proceed to trial. *Weaver* therefore conflicts with *Kammer* in that (1) the *Kammer* defendant's failure to refund student loan funds was considered a form of criminal misapplication and not as a separate and independent crime as in *Weaver*; and (2) *Kammer* required allegation and proof of conversion in a prosecution for the underlying act of failing to refund student loan funds, while *Weaver* did not. The Court should grant this Petition to prevent further intracircuit confusion and inequity.

IV. The Decision of the Court of Appeals is Erroneous

The Eleventh Circuit's holding that "fails to refund" constitutes a crime separate from criminal misapplication and that a prosecution for failure to refund student loans funds under § 1097(a) does not require allegation and proof of conversion is erroneous.

As "emphasize[d]" by Congress, "fails to refund" was added to § 1097(a) "merely" to clarify the conduct of failure to pay refunds forms a part of the crime of misapplication under that section. It was not Congress' intent to create a separate crime. In addition to the House Conference

Report accompanying the 1992 amendment to § 1097(a), Congress' intent not to create an offense separate and independent from criminal misapplication by the addition of "fails to refund" to § 1097(a) is further demonstrated by a February 28, 1992 correspondence from the sponsor of the amendment, Senator Nancy Landon Kassenbaum, to James B. Thomas, Jr., Inspector General of the United States Department of Education. In that correspondence, the legislation's sponsor stated:

> Dear Mr. Thomas:
>
> I am writing to make clear my intention in proposing a modification in the language of Section 490 of Title IV of the Higher Education Act. This modification is found in section 479 of S. 1150, the Senate version of legislation reauthorizing the Higher Education Act.
>
> My proposal, which was adopted by the Committee on Labor and Human Resources and included in S. 1150 as approved by the full Senate, adds to Section 490 a specific reference to the failure to make refunds of federal loan and grant funds provided or insured under Title IV. *My purpose in proposing this language was to clarify what is already intended by this section and to foreclose any argument that the section does not reach the failure to make refunds.*
>
> Section 490 of the Higher Education Act as currently written is extremely broad and reaches a variety of improper conduct involving Title IV funds. *The knowing and willful failure to make refunds has properly been prosecuted as a misapplication of Title IV funds under this section.* The language I proposed for inclusion in S. 1150 was never intended to imply in any manner that the

> current law did not reach such conduct. On the contrary, *my intention was to facilitate prosecution of such conduct by specifically referencing it.* I made this proposal because it came to my attention during the reauthorization process that the failure of some school owners to make refunds or make timely refunds is, unfortunately, a widespread abuse that causes serious harm to the integrity of the federal student financial assistance programs and harm to the students the programs are meant to benefit.
>
> ***It would be an unfortunate perversion of my intention if this clarifying language*** in S. 1150 ***concerning refunds were to be read as an indication that it is not a misapplication*** within the meaning of the current section 490 ***for a school owner knowingly and willfully to fail to make required refunds*** in connection with federally insured student loans and federal student grants.
>
> Warmest Regards,
>
> NANCY LANDON KASSENBAUM
> United States Senator

Joint Appendix to Brief of Appellant in *Bates v. United States*, 1997 WL 245541*40a (emphasis added).

Thus, it was not Congress' intent to create a new crime by the addition of "fails to refund" to § 1097(a). Rather, that language merely was added to ensure the conduct of failing to pay refunds was prosecutable as the offense of criminal misapplication. As noted by this Court and the Eleventh and Seventh Circuits, conversion is an element of criminal misapplication. *See Bates*, 522 U.S. at 31, 118 S.Ct. at 291; *Kammer*, 1 F.3d at 165. Accordingly, a

prosecution under § 1097(a) for failure to refund student loan funds requires allegation and proof of conversion.

As noted previously by this Court, § 1097(a) was designed to "catch[ ] only the transgressor who intentionally exercises unauthorized dominion over federally insured student loan funds for his own benefit or for the benefit of a third party. Innocent . . . maladministration of a business enterprise or a use of funds that is simply unwise [ ] does not fit within that construction." *Id.* at 291. The Eleventh Circuit's new crime of failure to refund which does not contain conversion as an element now "set[s] a trap for the unwary," *id.*, and criminalizes previously innocent conduct.

In addition to the legislative history of § 1097(a) and this Court's decision in *Bates*, the Eleventh Circuit's erroneous conclusion that failure to refund is a separate crime under § 1097(a) is further underscored by the observation that every reported decision concerning § 1097(a) treats the conduct of failing to refund student loan funds as criminal misapplication requiring allegation and proof of conversion. Also of note is the absence of a single reported case charging a defendant with both criminal misapplication and failure to refund. The absence of such cases further confirms failure to refund is not a crime separate and independent from criminal misapplication, but rather, as Congress and this Court have indicated, is an activity forming a part of criminal misapplication, of which conversion is an element.

V. The Questions Presented Are Important

The questions of whether failure to refund student loan funds is a crime separate and independent from

criminal misapplication under § 1097(a) and whether, if a separate crime, the failure to refund requires allegations and proof of conversion are important as they implicate a basic tenant of criminal law that the populace must have clear knowledge as to all the elements of criminal offenses, especially felonies. There currently are more than 5,300 educational institutions nationwide where students receive federal financial assistance. Thus, in addition to Mrs. Weaver, many other persons may be improperly subjected to prosecution for the failure to refund student loan funds pursuant to the Eleventh Circuit's decision.

The Eleventh Circuit's decision presents issues of extreme and urgent importance as every educational institutional, and its employees, paying legitimate operational expenses ahead of student loan refunds out of economic necessity is now guilty of criminal conduct. This was not the intent of Congress in amending § 1097(a). This Court should grant the petition to ensure consistent application of the law to those citizens under investigation for possible violations of § 1097(a) and to prevent the improper and unjust branding of innocent persons as felons.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 00-15142 & 00-15751

D. C. Docket No. 99-00204-CR-J-21C

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JUDY WEAVER,

Defendant-Appellant.

Appeals from the United States District Court
for the Middle District of Florida

(Filed December 18, 2001)

Before ANDERSON, Chief Judge, HULL and FAY, Circuit Judges.

HULL, Circuit Judge:

The Court hereby vacates its prior opinion, filed November 13, 2001, and substitutes this corrected opinion.

Defendant Judy Weaver appeals her conviction and sentence for knowingly and willfully aiding and abetting the failure of Flagler Career Institute to make refunds of

student loans and Pell Grant funds, in violation of 20 U.S.C. § 1097(a) and 18 U.S.C. § 2. After review and oral argument, we affirm.

I. BACKGROUND

This appeal primarily concerns the district court's denial of Weaver's motion to withdraw her guilty plea. We first review (a) Weaver's plea agreement, (b) her plea colloquy, and (c) the evidentiary hearing before the district court.

A. Plea Agreement

For about 10 years, Judy Weaver was the Director of Finance of Flagler Career Institute ("Flagler"), a proprietary school.[1] When students dropped out or withdrew, Flagler was required to refund the proceeds of Pell Grants and student loans guaranteed by the Department of Education. Weaver's duties included writing those refund checks. On July 14, 1999, the government filed a one-count information charging that, beginning in early 1996 and continuing through February 1998, Weaver "did knowingly and willfully aid and abet Flagler's failure to make refunds on behalf of approximately 165 students in the amount of more than $120,000 but less than $200,000," in violation of 20 U.S.C. § 1097(a) and 18 U.S.C. § 2.

Weaver entered into a plea agreement ("Agreement") wherein she acknowledged understanding the nature and

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[1] Flagler was a wholly-owned subsidiary of Wangberg Enterprises, Inc., a corporation owned solely by Louis Wangberg.

elements of her offense. The Agreement listed these elements as (1) "[t]hat the defendant failed to refund student loans insured by the Department of Education and Pell Grant funds provided by the Department of Education," and (2) "[t]hat the defendant did so knowingly and willfully."[2] In her Agreement, Weaver also admitted that she was "in fact guilty" and these facts:

> Flagler . . . , a proprietary school in Jacksonville, Florida, which closed in February 1998, offered associate degrees to its students in various medical related programs. Flagler was eligible for and participated in the Title IV Federal Student Financial Assistant Programs which provide various types of grants and loans to eligible schools. The loans are insured or guaranteed by the Department of Education and the grants are provided by the Department of Education. Participating schools are required to make a refund within 30 days after the student withdraws; the ending of a quarter or semester or trimester; or the date the institution determines that the student withdraws, whichever is earliest. The school is responsible for making student refunds in accordance with the distribution formula set forth under 34 C.F.R. 668.22. Schools participating in the federal student financial assistance programs must document student attendance, properly calculate refunds for students who drop out of or withdraw from school, and promptly refund the amount to the Department of Education or the appropriate lender.

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[2] Although the Agreement did not list "aiding and abetting" in this section, "aiding and abetting" was covered during the Rule 11 colloquy.

The defendant was employed as Flagler's Director of Finance from Fall 1989 until the school closed in February 1998. As Director of Finance, the defendant helped develop corporate strategies, policies, and budgets. Beginning in about 1991, she was responsible for writing the checks for Flagler, including refund checks. The defendant worked at various offices including Lighthouse Point, Florida, but her duties included handling refund issues for the Jacksonville-based Flagler.

When a student dropped out of or withdrew from Flagler, a drop computation form was prepared at the school and sent to the defendant with the amount of the refund due. Refund request packets were sent from Flagler in Jacksonville to the defendant weekly. The defendant reviewed the paperwork and changed the refund amount if she came up with a different calculation than the school's calculation. The defendant then sent the packet back to Jacksonville so the school could make the calculation changes and return the packet back to the defendant.

The defendant sent monthly accounts payable reports to Mr. Wangberg, which included the aggregate amount of the student refunds due. The defendant also spoke with Mr. Wangberg via telephone a number of times per month and discussed with him, among other things, the refund issue and Flagler's need to make refund payments. Mr. Wangberg was aware of the refund problem but he did not consider making refunds a priority.

In or about February 1997, Mr. Wangberg himself took over as the School Director of Flagler. As noted above, Mr. Wangberg was well

aware that Flagler owed a substantial amount of refund monies. When Mr. Wangberg ran the school, he took complete control of the funds and the defendant could not write any checks without his approval. During Mr. Wangberg's tenure as School Director, the amount of refund payments due continued to grow.

Mr. Wangberg and the defendant both knew that Flagler owed refunds and that they had a requirement to make the refunds. From in or about early 1996, Flagler, including Wangberg and the defendant, failed to refund student loans guaranteed by the Department of Education and Pell Grants provided by the Department of Education in the amount of more than $120,000 but less than $200,000, on behalf of approximately 165 students. To date, these refunds have not been made.

B. Rule 11 Colloquy

On August 16, 1999, the magistrate judge reviewed the elements of her offense with Weaver as part of both her waiver of indictment and plea colloquy. Weaver had no questions about them, had read and understood "every page and every word" of her Agreement, and knew "every word and every provision" was binding on her. The judge questioned Weaver: (1) whether she was pleading guilty because she was "in fact guilty"; (2) whether she committed the act charged in the information; (3) whether she understood that her guilty plea admitted the truth of the charge; and (4) whether she understood what she was doing by pleading guilty. Weaver responded affirmatively each time.

During the Rule 11 colloquy, the prosecutor read the above facts from the Agreement and Weaver agreed with them. Weaver also responded affirmatively to these questions:

> THE COURT: . . . Did you from in or about early 1996 to in or about February 1998 at Jacksonville in the Middle District of Florida and elsewhere aid and abet Louis Weinberg [sic] in Flagler's failure to make refunds of student loans and Pell grant funds?
>
> DEFENDANT: Yes, sir.
>
> THE COURT: Were the Pell grant [sic] funds provided by the Department of Education?
>
> DEFENDANT: Yes, sir.
>
> THE COURT: Did you knowingly and willfully aid and abet Louis Weinberg [sic] in Flagler's failure to make these refunds?
>
> DEFENDANT: Yes, sir.

The magistrate judge found that a factual basis existed for Weaver's plea, that those facts stated the elements of the offense, and that Weaver's guilty plea was freely, voluntarily, knowingly, and intelligently made. Weaver agreed with these findings and indicated her satisfaction with her attorney. The magistrate judge then issued a Report and Recommendation outlining these findings. Weaver did not object.

Thereafter, on September 8, the district court accepted Weaver's guilty plea, adjudged Weaver guilty, and set sentencing for December 2, 1999. The court later rescheduled it to February 3, 2000. During the interim, Weaver replaced her attorney, Mark Perry, with her current attorney, Curtis Fallgatter. The court continued sentencing to June 15, 2000.

C. Evidentiary Hearing on Motion to Withdraw

On May 31, 2000, Weaver moved to withdraw her guilty plea. Weaver's motion asserted that (1) she was under the mistaken impression that the crime to which she pled guilty was a strict liability crime, (2) she was misinformed as to the elements of the crime charged, (3) the facts outlined in the Agreement did not constitute the crime charged, (4) she was misinformed as to the testimony of key witnesses, (5) the Agreement had an internal inconsistency, and (6) she was innocent. During an evidentiary hearing on Weaver's motion, the district court heard testimony from both Weaver and Perry.

1. Weaver's Testimony[3]

Weaver testified that she understood the government's witnesses were "going to criminally implicate me" and "basically say it was my fault that the refunds were not paid," but later learned they were supporting her position that a crime had never been committed. At the time of her plea, Weaver had understood "that I simply

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[3] Weaver also had filed an affidavit with her motion to withdraw. Her hearing testimony essentially covers her affidavit testimony.

had to have knowledge that the refunds . . . were due and not paid – and that that made me guilty of a crime."

Regarding the factual statement in her Agreement identifying Weaver as "help[ing to] develop corporate strategies, policies, and budgets," Weaver did not understand this statement to mean that she was involved in developing a strategy for refunds. According to Weaver, Wangberg established the priorities for refund payments before she came to work for Flagler. Weaver's understanding of the *mens rea* required to violate § 1097(a) was as follows:

> At that time I fully understood that the willful issue was the fact, simply the fact that I had to have knowledge that the refunds were due and not paid and that made me guilty. That was it, that the government did not have to prove intent.

Weaver indicated that her attorney "did some research with case law" and said "there was no real case law and that the *Bates* case was the case law on this matter." This reference was to the Supreme Court's decision in *Bates v. United States,* 522 U.S. 23, 33 (1997), which held that a specific intent to defraud the government is not an essential element of criminal misapplication under § 1097(a).

In response to the court's questions, Weaver elaborated that she believed "the intent of never paying the refunds back" was a necessary element of a § 1097(a) violation, and that she never had this intent. Weaver explained that "nobody ever even conceived that not paying refunds was a crime." Weaver further indicated that "[m]y whole reason for withdrawing the plea is that

had I known and understood the facts and the law in August of '99, I would have never said I was guilty."

Weaver had not seen the pattern jury instructions defining "knowingly" and "willfully" until Fallgatter reviewed them with her. When she entered her plea, Weaver did not know that the definition of "willfulness" meant "that the act was committed voluntarily and purposefully, with the specific intent to do something the law forbids, that is with bad purpose, either to disobey or disregard the law."

Weaver testified that the loan funds were not used for any personal use by either her or Louis Wangberg, as follows:

> A. [sic] Did any of them get diverted by you for some personal use of yours or some company or bought a house or a car or some personal use?
>
> A. No.
>
> Q. To your knowledge did that get diverted to Mr. Wangberg for his personal use, cars or houses or entertainment or anything other than school business?
>
> A. No.
>
> Q. Did you exercise any control or dominion over those funds so they could be used for someone's benefit other than paying school bills?
>
> A. No. I had no authority. Dr. Wangberg was responsible for setting the priorities, and in the last year of the school establishing all approvals for all disbursements.

During cross-examination, Weaver admitted that (1) she understood a regulation existed which required Flagler to refund student loans on a timely basis, (2) she understood that rules existed which indicated how to make the refunds, and (3) she discussed these rules with Wangberg. Weaver further acknowledged that around June 1996 she, along with Roth and Wangberg, made a collective decision to bring the refunds current. Weaver sent refund checks to the school to have them held there and not mailed out until the cash was received in the bank. Weaver testified that "we did that with other bills too." She acknowledged that the checks "were cut" and "entered into the books as having been paid," and that to the auditors, it would have appeared that the refunds had been made. Weaver further testified that "[w]e had signed a letter to our auditor stating that our refunds were current" when they were not, that when she wrote the checks "we considered them paid," and that the checks were going to sit in a drawer "[f]or a very short time until we got the money in the bank."

Weaver acknowledged her signatory authority over Flagler's operating account, that the operating account was the account from which refunds were paid, and that when refunds were made she would process them. Weaver denied, however, that she was the one who signed the checks, stating that she only "processed them and sent them to the school."

Weaver met with Perry more than five times and was provided a draft of a plea agreement in '98 and another one in March of '99. She reviewed the plea agreement "exhaustively" with Perry and her husband. Perry explained to her that the government's position was "that I simply had to have knowledge that the refunds were due

and not paid, period," and that the government had no burden to prove "intent to defraud." Perry did not discuss what "knowingly" and "willfully" meant, but advised her that the government's position was that "they did not have to prove intent" and that Weaver "simply had to know that refunds were due and not paid."

2. "Perry's Testimony

On direct examination, Perry testified as to the truth and accuracy of his affidavit. Perry's affidavit stated that *Bates* and § 1097(a) "was [sic] the only case or law addressing the issue of intent that [he] discussed with [Weaver]." Perry's affidavit also indicated that the terms "willfully" and "aid and abet" were not defined in the Agreement or during the Rule 11 hearing and that Weaver "could easily have been confused regarding whether or not her conduct was such as to satisfy the element of willfulness under [the] statute."

On cross-examination, however, when asked about his affidavit statement that Weaver "could easily have been confused," Perry testified that he did not prepare the affidavit, that he "did not put any of the words in [it]," that "[s]he did understand," and that "she didn't indicate to me in anyway [sic] that she was confused." Perry's testimony on cross-examination also contradicted Weaver's assertion that Perry believed that § 1097(a) was a strict liability crime. Specifically, Perry stated that after reading *Bates* he understood that "you still had to establish that [the failure to refund was] willful and voluntary and a knowing violation of the law . . . [b]ut you did not have to establish, upon reading that case, that [Weaver] had a fraudulent intent."

Perry also testified that in his representation of Weaver he was "convinced" that she knowingly failed to make refunds, that Weaver told him that she participated with Wangberg in decisions involving the refunds, and that Weaver told him that she wrote checks for refunds, kept them in a drawer, and the books showed that the checks had been written.[4]

Perry further testified that Weaver told him that she paid herself a bonus and that he and Weaver discussed the implications of this in deciding whether to plead guilty.[5] Perry's understanding was that Weaver "paid herself and she may have paid Mr. Wangberg a bonus based upon funds that were in the account and the refunds had not been paid." Perry gave the *Bates* decision to Weaver, discussed it with her, and thought she had a full understanding of criminal intent. Weaver made no indication that she did not understand the elements of the offense. Perry admitted, however, that he couldn't say that he "pulled out the pattern jury instructions and went through willfully and knowingly [with Weaver]."[6]

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[4] On redirect, Perry was asked, "Would it be a surprise to you if indeed the facts were that all the checks were sent to the school and maintained by the Director, and that if it was in a drawer, it was in a drawer at the school, not in [Weaver's] personal drawer . . . ?" In response, Perry testified that it was his understanding the checks were kept in Weaver's drawer.

[5] On redirect, Perry testified that the bonus was "[i]n the thousands" but that he could not remember the exact amount.

[6] The district court also heard testimony from George Wisnovsky, a private investigator who testified as to the accuracy of his two affidavits recounting what Charles Roth, Flagler's Executive Director, and Joyce Byrd, Flagler's Director of Administration and Financial Aid, had told

(Continued on following page)

D. Order Denying Motion to Withdraw

On September 22, 2000, the district court denied Weaver's motion to withdraw. The district court found (1) that Weaver was not misinformed as to what the words "knowingly" and "willfully" meant, (2) that there was no evidence of misrepresentation by the government as to any witnesses, (3) that any "inconsistency" in the Agreement was adequately addressed during the Rule 11 colloquy, and (4) that Weaver's assertion of innocence alone did not entitle Weaver to withdraw her plea. Although during closing arguments Weaver's counsel had argued that conversion of the loan proceeds for Weaver's own use or benefit of another was also a required element of a § 1097(a) violation, the district court did not expressly address that issue.

The district court ultimately sentenced Weaver to four months' imprisonment and four months' home detention.

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him during interviews. Although the district court admitted Wisnovsky's affidavits into evidence, it ultimately decided not to consider this hearsay testimony because Roth and Byrd did not sign affidavits and did not testify during the hearing. The district court also found the statements unreliable based on other testimony during the hearing. Contrary to Weaver's contentions, the district court did not err in not considering Wisnovsky's testimony and affidavits about what Roth and Byrd had told him.

Michelle Frigola, Flagler's corporate counsel, also testified as to the accuracy of her affidavit. This affidavit, along with her testimony, revealed Frigola's opinion that Weaver was innocent. Frigola also testified about the process by which she prepared her affidavit and her general knowledge about Flagler's failure to make refunds. Frigola's testimony revealed that she knew little about the refund issue, in part, because her legal representation of Flagler was limited to reviewing leases, reviewing contracts, and pursuing payment from students who failed to pay tuition.

Weaver timely appealed both the denial of her motion to withdraw and her sentence.[7]

II. DISCUSSION

A. Rule 32(e): Motion to Withdraw

Weaver filed her motion to withdraw her plea pursuant to Federal Rule of Criminal Procedure 32(e), which provides that "[i]f a motion to withdraw a plea of guilty . . . is made before sentence is imposed, . . . the court may permit the plea to be withdrawn if the defendant shows any fair and just reason." Fed.R.Crim.P. 32(e).[8] The factors to be considered in evaluating whether a guilty plea may be withdrawn include the following: "(1) whether close assistance of counsel was available; (2) whether the plea was knowing and voluntary; (3) whether judicial resources would be conserved; and (4) whether the government would be prejudiced if the defendant were allowed to withdraw his plea." *United States v. Buckles,* 843 F.2d 469, 471 (11th Cir. 1988) (internal citation omitted).

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[7] On September 29, 2000, Weaver timely filed a Notice of Appeal from the district court's order denying her motion to withdraw. On October 20, 2000, Weaver timely filed a Notice of Appeal from her sentence. This Court consolidated Weaver's appeals.

[8] Although this portion of Fed.R.Crim.P. 32(e) "is to be liberally construed . . . [, i]t is well settled . . . that there is no absolute right to withdraw a guilty plea prior to imposition of a sentence." *United States v. Buckles,* 843 F.2d 469, 471 (11th Cir. 1988). Instead, "[t]he decision to allow withdrawal is left to the sound discretion of the trial court." *Id.* The district court's denial of Weaver's pre-sentencing motion to withdraw is reviewed for an abuse of discretion and will not be reversed unless the court's decision is "arbitrary or unreasonable." *Id.*

Weaver contends, *inter alia,* that her plea was not knowing or voluntary because (1) conversion is an essential element of her § 1097(a) violation, and (2) she was not advised about the conversion element before entering her plea.[9] Section 1097(a) provides that "[a]ny person who knowingly and willfully embezzles, *misapplies,* steals, obtains by fraud, false statement, or forgery, *or fails to refund*" financial aid funds provided or insured by the federal government is subject to criminal liability. 20 U.S.C. § 1097(a) (emphasis added). A 1992 amend ment added "or fails to refund" to § 1097(a).[10] This Court previously concluded that conversion is an element of criminal misapplication under § 1097(a). *See United States v. Kammer,* 1 F.3d 1161 (11th Cir. 1993). In this case, however, Weaver was charged with only "fails to refund"

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[9] On appeal, Weaver also claims that the district court erred in denying her motion because (1) she misunderstood the elements of "knowingly," "willfully," and "aiding and abetting," (2) she was innocent, (3) the government misrepresented the strength of its case to Weaver during plea negotiations, (4) the government failed to carry its burden of establishing that prejudice would result if Weaver were allowed to withdraw her plea, and (5) the factual basis for her plea failed to show that she acted "knowingly" and "willfully," or that she "aided and abetted" Flagler's failure to make refunds. After review and oral argument, we conclude that these claims lack merit and do not warrant further discussion. Because we conclude conversion is not an element of Weaver's offense, we need not reach Weaver's claim that the factual basis for her plea failed to show a conversion.

[10] Weaver was charged with aiding and abetting a § 1097(a) violation under 18 U.S.C. § 2, which provides that "[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal." Because § 1097(a) is the underlying substantive crime, we focus primarily on § 1097(a).

and not criminal misapplication. Thus, her appeal presents the issue of whether "fails to refund" is an independent ground upon which criminal liability attaches under § 1097(a), and, if so, whether conversion is an element for that separate crime. To answer these issues, we review relevant precedent and then the 1992 amendment to § 1097(a).[11]

B. Misapplication Under § 1097(a)

Our circuit's principal decision discussing § 1097(a) is *United States v. Kammer,* 1 F.3d 1161 (11th Cir. 1993). The indictment charged Kammer with "embezzling, misapplying, and stealing" federal financial aid funds in violation of 20 U.S.C. § 1097(a) and 18 U.S.C. § 2.[12] *Kammer,* 1 F.3d at 1163. Reversing Kammer's misapplication convictions, this Court concluded that "[t]o establish a criminal misapplication [under § 1097(a)] the government must prove (1) a conversion of the property to the use of the defendant or a third party, and (2) fraudulent intent." *Id.* at 1165. We defined conversion as "'an act of dominion or control over the property that seriously interferes with the owner's rights.'" *Id.* (quoting *United States v. Jakeway,* 783 F. Supp. 590, 597 (M.D. Fla. 1992)).

This Court determined that the government's evidence did not show either a conversion or an intent to

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[11] Whether conversion is a required element for a § 1097(a) violation is a question of law subject to de novo review. *See United States v. Gray,* 206 F.3d 1267, 1271 (11th Cir. 2001).

[12] Kammer was indicted in 1991, before the 1992 amendment which added "or fails to refund" to § 1097(a).

defraud. *Id.* at 1165-66. Kammer owned a school whose financial condition deteriorated; Kammer failed to refund loan payments and the withdrawn students' files contained copies of non-negotiated refund checks. *Id.* at 1162-63. Kammer explained that she was "aging debts," including refunds, so that "the most necessary and immediate debts" could be paid first. *Id.* at 1163. These included Kammer's "salary, campus renovations, consulting fees, loan repayment to her husband, and her private housekeeper." *Id.* at n. 5.

Because federal regulations allowed the school to "commingle" its own money with federal financial aid funds, this Court concluded that "[t]he fact that [the school] may have paid operating expenses before a student withdrew, and thus did not have money to refund [the Department of Education] is not a conversion."[13] *Id.* at 1166. The fact that Kammer may have paid other operating expenses before making the refunds also did not establish a conversion because "[w]hat happened in this case is exactly what the program anticipated: a commingling of funds with grant funds being used for operating expenses." *Id.* This Court concluded that "[u]nder these circumstances, we cannot find that the government

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[13] Specifically, the school was allowed to deposit Pell Grant funds and student loans into its corporate operating account. *Kammer,* 1 F.3d at 1165. The school paid its debts, operating expenses, and refunds for withdrawn students out of its corporate account. *Id.* Given this permissible procedure, this Court noted that "when a student withdrew, [the school] may not have had sufficient funds in its operating account to reimburse [the Department of Education] because it had expended monies for other obligations. After all, [the school] could not control the timing of a student's withdrawal." *Id.* at 1166.

intended to maintain supervision and control over the funds after the point of the commingling of the funds." *Id.* In addition, this Court held that "the government has not demonstrated that Kammer had the requisite intent to defraud the government." *Id.* We stressed, however, that "we do not hold that a failure to refund federal monies will never constitute a crime. . . . We reverse in this case strictly on the facts of this case." *Id.*

After our *Kammer* decision, the Supreme Court decided *Bates v. United States,* 522 U.S. 23 (1997). As we now explain, *Kammer*'s conclusions about conversion survive *Bates* but its holding regarding intent to defraud does not.[14]

Similar to *Kammer,* the indictment in *Bates* charged a school's officer with "'knowingly and willfully misapply[ing]'" federally insured student loan funds in violation of § 1097(a) and 18 U.S.C. § 2.[15] *Id.* at 28. The defendant had "initiated a pattern and practice of not making refunds," permitted management fee and salary payments to take priority over refunds, instructed others to not make refunds, and failed to make the required refunds.[16]

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[14] The Supreme Court had granted certiorari in *Bates* to resolve the conflict between the Seventh Circuit's *Bates* decision and our *Kammer* decision regarding whether a specific intent to defraud was required for the crime of misapplication under § 1097(a). *Bates,* 522 U.S. at 29.

[15] The defendant officer was indicted in 1994 based on his actions during 1990.

[16] The management fees which took priority over refunds were allegedly "'upstream[ed]'" to Education America, Inc., of which the defendant was vice president. *Bates,* 522 U.S. at 28.

Id. at 27-28. The district court dismissed the indictment for failure to allege intent to injure or defraud. *Id.* at 28. Reversing the dismissal, the Seventh Circuit concluded that intent to defraud or injure the government is not an element of criminal misapplication, which requires only that "the defendant misapplied – i.e., converted – Title IV funds and that he did so knowingly and willfully." *United States v. Bates,* 96 F.3d 964, 970 (7th Cir. 1996). Affirming the Seventh Circuit, the Supreme Court held expressly that the specific intent to injure or defraud the government or another is not an element of the misapplication of funds proscribed by § 1097(a). *Bates,* 522 U.S. at 29.

Although *Bates* did not address directly whether conversion is an element of criminal misapplication under § 1097(a), such a conclusion is implicit in its holding that a specific intent to defraud is not a required element of criminal misapplication. Specifically, the Supreme Court quoted and relied on the Seventh Circuit's "working definition" of willful misapplication under § 1097(a), which, in essence, requires a conversion, as follows:

> [W]illful misapplication under § 1097(a) requires the government to allege and prove that the defendant consciously, voluntarily, and intentionally exercised unauthorized control or dominion over federally provided or guaranteed Title IV funds that interfered with the rights of the funds' true owner(s), for the use and benefit of the defendant or a third person, while knowing that such an exercise or dominion over the funds was a violation of the law.

Id. at 31 n. 7 (quoting *United States v. Bates,* 96 F.3d at 970). The Supreme Court relied on this "working definition" to refute the defendant's argument that if intent to

defraud is not an element, "innocent maladministration of a business enterprise" or "unwise" use of funds, as the defendant put it, would fall within criminal misapplication under § 1097(a). *Bates,* 552 U.S. at 31. The Supreme Court noted that the Seventh Circuit's construction of criminal misapplication under § 1097(a) reaches "only the transgressor who intentionally exercises unauthorized dominion over federally insured student loan funds for his own benefit or for the benefit of a third party." *Id.* Thus, *Kammer*'s determination that conversion is an element of a § 1097(a) misapplication survives *Bates* even though its intent-to-defraud holding does not.

C. "Fails to Refund" Under § 1097(a)

Although conversion remains an element of misapplication under § 1097(a), the more difficult issue is whether "fails to refund" is an independent ground upon which criminal liability attaches under § 1097(a), and, if so, whether conversion is an element of that offense as well.

In 1992, Congress specifically added "or fails to refund" to § 1097(a). *See* Higher Education Amendments of 1992, Pub. L. 102-235, § 495, 106 Stat. 631. Significantly, the act of failing to refund is listed separately from the criminal act of misapplication and is connected by "or."[17] There is no indication on the face of § 1097(a) that Congress intended "misapplies" and "fails to refund" to be

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[17] *See Garcia v. United States,* 469 U.S. 70, 73 (1984) ("Canons of construction indicate that terms connected in the disjunctive in this manner be given separate meanings.").

the same thing or interchangeable. For example, Congress did not amend § 1097(a) to provide criminal penalties for "[a]ny person who knowingly and willfully . . . misapplies by failing to refund." Furthermore, if this language does not create a ground upon which criminal liability attaches, separate from misapplication, then "or fails to refund" would be mere surplusage. We decline to read § 1097(a) in this way.[18] Instead, the text of § 1097(a) is clear and, therefore, we conclude that "fails to refund" is an independent activity which is criminalized under § 1097(a).

Despite the plain language of "or fails to refund" in § 1097(a), Weaver argues that the legislative history of the 1992 amendment supports the conclusion that "fails to refund" is not a separate ground upon which criminal liability attaches but is merely interchangeable with misapplication. Weaver relies on a House Conference Report which states that the "failure to pay refunds does constitute criminal misapplication under current law. Language is added in this bill merely as a clarification."

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[18] *See Bailey v. United States*, 516 U.S. 137, 145-46 (1995) (disagreeing with the argument that a federal criminal statute which prohibits both using and carrying a firearm should be read in a way that would make the terms "use" and "carry" redundant, in part, because "Congress has specified two types of conduct [which are prohibited and] . . . [w]e assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning"); *United States v. Canals-Jimenez*, 943 F.2d 1284, 1286-87 (11th Cir. 1991) (concluding that the term "found in," as used in a federal criminal statute that imposes liability upon an alien who "enter[s]," "attempts to enter," or is "found in" the United States, "must have a different meaning from 'enters' and 'attempts to enter'" in part because "[a] basic premise of statutory construction is that a statute is to be interpreted so that no words shall be discarded as being meaningless, redundant, or mere surplusage").

H.R. Conf. Rep. No. 102-630, at 513 (1992), *reprinted in* 1992 U.S.C.C.A.N. 334, 628. Weaver contends that "or fails to refund" was added only to clarify that a misapplication may encompass the failure to refund and that it is not an independent ground for criminal liability.

We decline, however, to look beyond the plain language of § 1097(a). In our circuit, "[w]hen the import of the words Congress has used is clear, as it is here, we need not resort to legislative history, and we certainly should not do so to undermine the plain meaning of the statutory language." *Harris v. Garner,* 216 F.3d 970, 976 (11th Cir. 2000) (en banc); *CBS Inc. v. PrimeTime 24 Joint Venture,* 245 F.3d 1217, 1227 (11th Cir. 2001). In our circuit, there is only "one recognized exception to the plain meaning rule – absurdity of results." *CBS Inc.,* 245 F.3d at 1228; *Merritt v. Dillard Paper Co.,* 120 F.3d 1181, 1188 (11th Cir. 1997).

Applying our circuit's precedent, we find no reason to look beyond the plain language of § 1097(a). First, as noted, the language of § 1097(a) is unambiguous: the "knowing and willful" failure to make refunds is a criminal act. Second, applying § 1097(a) according to its plain language, and imposing criminal liability for the "knowing and willful" failure to make refunds, does not lead to "absurd" results. *See United States v. Williams,* 121 F.3d 615, 621 (11th Cir. 1997) (noting that the "[c]riminalization of the willful failure to pay is not new to the criminal code; it appears frequently in the tax statutes").

Notwithstanding this recognized plain meaning rule, judges sometimes have not resisted the temptation to set out and discuss legislative history. *See Harris,* 216 F.3d at

976-79; *United States v. Gilbert,* 198 F.3d 1293, 1299 (11th Cir. 1999). We equally succumb and point out that the relevant legislative history is ambiguous here. Weaver's interpretation is that the amendment clarified that misapplication may encompass a failure to refund but did not eliminate the conversion requirement for a misapplication, even when the conduct is the failure to refund. Another interpretation, however, is that Congress recognized that it had created a separate crime with its "or fails to refund" language and added this legislative history to foreclose the obvious post-amendment argument that failure to refund only became a crime under § 1097(a) after the 1992 amendment. More specifically, under this interpretation, the legislative history only makes clear that an individual who failed to refund could always have been charged with criminal misapplication under the pre-amendment § 1097(a), and that the addition of "fails to refund" as a separate crime does not change this.[19] Even if, as Weaver argues, the legislative history were clear and

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[19] Although *Kammer* and *Bates* discussed this legislative history, neither addressed it in this context. In *Kammer,* this Court noted the legislative history as follows: "[t]he government submitted legislative history on the Higher Education Act of 1965, indicating that 'failure to pay refunds does constitute criminal misapplication under current law.' Thus, Congress indicated that persons who failed to refund grant funds to the government could be charged with criminal misapplication." 1 F.3d at 1166 (internal citation omitted). As already discussed, the issue in *Kammer* was whether the failure to make refunds was a criminal misapplication under § 1097(a). Because Kammer was indicted for "misapplication," and not "fails to refund," *Kammer* did not address whether "or fails to refund" creates an independent ground of liability. Similarly, the defendant in *Bates* was charged with criminal misapplication, not "fails to refund," and, thus, the Supreme Court also did not address that issue. *See Bates,* 522 U.S. at 32.

contrary, in our circuit we do not "give even clear legislative history more weight than clear statutory language." *CBS Inc.*, 245 F.3d at 1227.

In any event, we decline to look beyond the plain language of § 1097(a) and conclude that, according to its plain language, "fails to refund" is an independent ground upon which criminal liability attaches.

D. Elements of "Fails to Refund"

We next examine whether to engraft an element of conversion onto the offense of "fails to refund" as courts have done for a misapplication violation under § 1097(a). For several reasons, we decline to do so.

First, it is well established that "we ordinarily resist reading words or elements into a statute that do not appear on its face." *Bates*, 522 U.S. at 29 (concluding that the specific intent to defraud is not an element of the crime of misapplication under § 1097(a), in part, because § 1097(a) does not state that the specific intent to defraud is an element). Second, there is no basis upon which we can conclude that Congress intended conversion to be an element of the failure to refund federal financial aid funds under § 1097(a). In contrast, the term "misapplies" implies that a conversion must exist. The Supreme Court long ago construed the language "willfully misapplies" in the context of another federal criminal statute to require an additional, unstated element of "a conversion to [the defendant's] own use or the use of some one else." *United States v. Britton*, 107 U.S. 665, 666-67 (1883). Thus, because we "presume that Congress expects its statutes to be read in conformity with th[e] [Supreme] Court's precedents," *United States v. Wells*, 519 U.S. 482, 495

(1997), there is at least some argument that Congress intended conversion to be an element of misapplication under § 1097(a) when it used the misapplication language.

Unlike "misapplies," however, the term "fails to refund" does not imply that a conversion must exist. Weaver does not cite any precedent in which any court has construed the language "fails to refund" in § 1097(a), or similar language in other statutes, to demand a showing of conversion. Thus, we have no reason to believe that Congress intended conversion to be an additional, unexpressed element of the criminal act of "knowingly and willfully" failing to refund federal financial aid funds.[20] As such, we decline to read this element into § 1097(a).

E. Weaver's Sentence

Weaver also appeals her sentence contending that the district court erroneously determined the amount of loss. We do not address that issue because Weaver knowingly and voluntarily waived her right to appeal her sentence except under certain circumstances not relevant to this appeal.[21]

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[20] Even Weaver seems to agree with this conclusion. More specifically, Weaver states in her brief that "misapplication . . . is a term of art that . . . means conversion. . . . The term 'fails to refund' carries no such inherent definition."

[21] Specifically, the provision provides that Weaver had "expressly waive[d] the right to appeal [her] sentence, directly or collaterally, on any ground except for an upward departure by the sentencing judge or a sentence above the statutory maximum or a sentence in violation of the law apart from the sentencing guidelines." We review *de novo* the

(Continued on following page)

An appeal-of-sentence waiver provision is enforceable if the waiver is made knowingly and voluntarily. *United States v. Bushert,* 997 F.2d 1343, 1350-51 (11th Cir. 1993). To establish the waiver's validity, the government must show either that (1) the district court specifically questioned the defendant about the provision during the plea colloquy, or (2) it is manifestly clear from the record that the defendant fully understood the significance of the waiver. *Id.* Here, the waiver provision was referenced during Weaver's Rule 11 plea colloquy and Weaver agreed that she understood the provision and that she entered into it freely and voluntarily. Thus, her waiver is valid. The exceptions to her waiver do not apply because there was no upward departure by the district court, her sentence is not above the statutory maximum, and her sentence does not violate the law apart from the sentencing guidelines.

IV. [sic] CONCLUSION

For the foregoing reasons, we conclude that the district court did not err in accepting Weaver's guilty plea or in denying Weaver's motion to withdraw her plea. We further conclude that Weaver waived the right to appeal her sentence except under certain circumstances not

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validity of an appeal-of-sentence waiver provision. *United States v. Bushert,* 997 F.2d 1343, 1352 (11th Cir. 1993).

implicated by her appeal. Thus, we affirm Weaver's conviction and sentence.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 00-15142 & 00-15751

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JUDY WEAVER,

Defendant-Appellant.

On Appeal from the United States District Court
for the Middle District of Florida

(Filed Feb. 26, 2002)

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC (Opinion _____, 11th Cir., 19__, ___ F.2d ___.

Before: ANDERSON, Chief Judge, HULL and FAY, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35,

Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Frank M. Hull
UNITED STATES CIRCUIT JUDGE

United States Court of Appeals
For the Eleventh Circuit

No. 00-15142 & 00-15751

District Court Docket No.
99-00204-CR-J-21C

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JUDY WEAVER,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

JUDGMENT

(Filed Dec. 18, 2001)

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered: December 18, 2001
For the Court: Thomas K. Kahn, Clerk
By: McCombs, Elaine

(Issued Mar. 14, 2002)